Supreme Court, U.S.
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No. 02-452

IN THE

Supreme Court of the United States

MARTIN GOLD, as Trustee of the
Martin Gold, Attorney at Law, P.C.
Defined Benefit Pension Plan dated 12-10-87,
individually and on behalf of others similarly situated,

Petitioner,

v.

SQUADRON, ELLENOFF, PLESENT & LEHRER,
SQUADRON, ELLENOFF, PLESENT & SHEINFELD, LLP
and IRA L. SORKIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK SUPREME COURT
APPELLATE DIVISION—FIRST DEPARTMENT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The caption of the case lists the names of all parties. As respondents are two law firm partnerships (no longer in operation) and an individual, no corporate disclosure statement is required.

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David D. Siegel, *Commentary: The 1990 Adoption of § 1367, Codifying "Supplemental" Jurisdiction*, 28 U.S.C.A. § 1367 (West 1993) 4-5

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Respondents (collectively referred to here as "Squadron Ellenoff") respectfully submit this brief in opposition to Martin Gold's petition for a writ of certiorari. The New York Court of Appeals correctly determined that the decision of the trial court, as unanimously affirmed by the Appellate Division, raises no constitutional issue nor any other issue meriting review. The decision was based entirely upon a New York statute governing the time for filing and effecting service of an action in state court following the dismissal of a prior suit. That statute is in no way inconsistent with federal law or the U.S. Constitution. In violation of Rule 14(1)(f), Gold does not even mention the New York statute, and his inexplicable failure to comply with its service requirement — rather than any refusal to apply federal law — was what prompted dismissal of his case.

THE DISPOSITIVE STATUTE OMITTED FROM THE PETITION

New York Civil Practice Law and Rules ("CPLR") 205 (McKinney 1992 Supp.):

> **Termination of action.**
>
> (a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence

or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of the commencement of the prior action and that service upon defendant is effected within such six-month period.

COUNTERSTATEMENT OF THE CASE

While the petition accurately recites the history of the initial federal class action brought against Squadron Ellenoff and others resulting from the collapse of Towers Financial Corporation ("Towers"), it omits several pertinent facts about the subsequent state court action whose dismissal is now sought to be reviewed.

Gold himself filed the first Towers-related class action in federal court barely a week after the Securities and Exchange Commission commenced the enforcement proceeding that led to Towers' downfall in February 1993. He continued as a lead class plaintiff after his complaint was consolidated with several others in a multidistrict litigation in the Southern District of New York. More than five and one-half years later, on November 16, 1998, all claims against Squadron Ellenoff were finally dismissed. (A6).

On February 5, 1999, Gold alone commenced the action now at issue by filing a summons with notice in New York State Supreme Court.[1] But Gold did not *serve* Squadron Ellenoff with the summons until May 27, 1999 — more than six months after the federal action had been dismissed, and more than six years after the conduct alleged in the complaint

1. No complaint was actually filed until Squadron Ellenoff made a demand for a complaint pursuant to CPLR § 3012(b).

had last occurred. Gold does not dispute that, absent some form of tolling, his state court action was manifestly untimely.[2]

Squadron Ellenoff moved to dismiss the action on three separate grounds: untimeliness, collateral estoppel based on the dispositive holdings in the prior federal suit, and failure to state a claim. Because the action was deemed time-barred, the trial court found it unnecessary to reach "the merits of plaintiff's claims or defendants' remaining arguments for dismissal." (A9).

Gold asserts that he raised "the federal question sought to be reviewed here [] in the state trial court as soon as respondents moved to dismiss the complaint on statute of limitations grounds." (Pet. at 6). That is not correct. While Gold did try to invoke 28 U.S.C. § 1367(d) (as well as CPLR 205(a), and the doctrine of "equitable tolling"), he made no reference whatever to the Supremacy Clause, or to the U.S. Constitution generally, in either the trial court or the Appellate Division. The first time he ever mentioned the U.S. Constitution was when he purported to file an appeal as of right to the New York Court of Appeals pursuant to CPLR 5601(b)(1), which authorizes such an appeal if the order in question "directly involved the construction of the constitution of the state or of the United States." The Court of Appeals dismissed that appeal *sua sponte* because no such constitutional issue was involved. (A12-13).

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2. The parties vigorously litigated whether the tolling periods provided by 28 U.S.C. § 1367(d) and CPLR 205(a) ran from when the federal district court entered final judgment dismissing all claims against Squadron Ellenoff on November 16, 1998, or from when plaintiffs voluntarily withdrew their appeal to the Second Circuit from that judgment on March 9, 1999. Gold now accepts the New York courts' determination (A7) that the earlier date controlled. *See* Pet. at 6-7.

REASONS FOR DENYING THE PETITION

The petition rests entirely on the false assertion that "the state courts refused to apply the tolling provision of 28 U.S.C. § 1367(d) in derogation of the state courts' duty under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2 to enforce federal law." (Pet. at 8). To the contrary, the New York courts simply determined that 28 U.S.C. § 1367(d) was inapplicable because, by its terms, it applies only "unless State law provides for a longer tolling period." New York law, as embodied in CPLR 205(a), provides a tolling period six times greater than the one offered by 28 U.S.C. § 1367(d), rendering the federal statute irrelevant.

The trial court's opinion, adopted wholesale by the Appellate Division, explained:

> Clearly, CPLR 205(a), which stops the limitations clock for the period of pendency [of the prior federal action] plus six months rather than 30 days, provides a longer tolling period. Thus state law controls and plaintiff must comply with the provisions of CPLR 205(a) to get the benefit of the toll under the federal statute as well.

(A8). This interpretation is shared by Professor Siegel, a respected commentator on both New York's Civil Practice Law and Rules and 28 U.S.C. § 1367. Professor Siegel observes that CPLR 205(a) is "some six times more generous a gift than the federal statute's 30 days" and § 1367(d) therefore "defers to it." David D. Siegel, *New York Practice* § 614, at 1047 (3d ed. 1999). *Accord* David D. Siegel, *Commentary: The 1990 Adoption of § 1367, Codifying "Supplemental" Jurisdiction*, 28 U.S.C.A. § 1367, at 829,

837 (West 1993). Our research has not revealed a single instance where a New York court has applied 28 U.S.C. § 1367(d). Gold has cited none. In fact, Gold does not even cite CPLR 205(a) in his petition, let alone address the consensus that it supplants 28 U.S.C. § 1367(d) in New York.

Gold also fails to disclose the actual ground on which his state court action was dismissed. While he filed that action on February 5, 1999, within the six-month window provided by CPLR 205(a), he failed to comply with the statute's additional requirement "that service upon defendant [be] effected within such six-month period." Instead, for reasons he has never explained, Gold delayed service until May 27, 1999, well past the six-month deadline. (A7-8). Indeed, his service even on that date occurred on the 120th day after the suit was filed, which would have been the final day to effect service if the general service rule, CPLR 306-b, rather than CPLR 205(a), had controlled.

In enacting CPLR 205(a), the New York Legislature sensibly determined that, when a plaintiff whose prior suit has been dismissed wishes to re-file his claims, he must do so within six months and *serve* the defendant within the same six-month period. That rule accords with the purpose of limitations periods, to allow parties repose when a reasonable period of time has passed without receiving word of a lawsuit. The rule also recognizes that there is no excuse for delaying service upon a party who previously defended related claims in a prior suit. Nothing in 28 U.S.C. § 1367(d), or any other federal statute, limits the power of the states to establish rules governing when service must be made to pursue proceedings in their courts.

In fact, 28 U.S.C. § 1367(d) is completely silent as to when service of a subsequent suit must be made, thus necessarily leaving this matter to state law. Gold's argument boils down to the odd contention that the New York courts should have ignored the service requirement of CPLR 205(a) and applied instead the very different service requirement prescribed by CPLR 306-b, which pertains only to claims asserted in the first instance rather than to those re-filed following their prior dismissal. But that would have been clearly erroneous, and the New York courts' decision to apply one service rule as opposed to another was, in any event, purely a matter of state law, not an appropriate subject for certiorari.

Nor would Gold's action have been timely even if 28 U.S.C. § 1367(d) had been applicable. His state law claims in federal court were finally dismissed by the district court on November 16, 1998, and those claims were not re-filed in state court until February 5, 1999, twenty-one days beyond the 30-day period provided by the federal statute. To evade this problem, Gold contends that § 1367(d) tolls the running of the statute of limitations during the pendency of the prior case in such a way that whatever time still remained under the applicable statute of limitations when that case was filed is *added* to the 30-day period prescribed by § 1367(d). (Pet. at 6-7). Gold misconstrues § 1367(d).

In *Chardon v. Soto*, 462 U.S. 650 (1983), this Court observed that tolling can take a variety of forms:

> "Tolling effect" refers to the method of calculating the amount of time available to file suit after tolling has ended. The statute of limitations might merely be suspended; if so, the plaintiff must file

> within the amount of time left in the limitations period. If the limitations period is renewed, then the plaintiff has the benefit of a new period as long as the original. It is also possible to establish a fixed period such as six months or one year during which the plaintiff may file suit, without regard to the length of the original limitations period or the amount of time left when tolling began.

Id. at 652 n.1. The thirty days provided by 28 U.S.C. § 1367(d) falls into the last of these categories; it is a "fixed period . . . during which the plaintiff may file suit." *See, e.g., McInnis-Misenor v. Maine Medical Center*, 211 F. Supp. 2d 256, 263 (D. Maine 2002) (warning that plaintiffs "will be obliged by statute-of-limitations concerns to re-file their state-law claims immediately in state court" pursuant to § 1367(d), even though federal claim was brought shortly after events at issue); *Kolani v. Gluska*, 75 Cal. Rptr. 2d 257 (Cal. Ct. App. 1998) ("[Thirty] days is ample time for a diligent plaintiff to refile his claims and keep them alive. . . . Section 1367 subdivision (d) does not allow plaintiffs to 'tack' onto the limitations period the full time during which the federal action was pending.").

Allowing a plaintiff thirty days to re-file previously dismissed state law claims fully serves § 1367(d)'s purpose of ensuring that federal courts can dismiss pendent state law claims without prejudice while preserving the plaintiff's opportunity to pursue those claims in state court. Gold's interpretation of § 1367(d) tolling, by contrast, would lead to absurd results, well illustrated here. Under Gold's "suspense" theory of tolling, he would have had nearly five and a half years from the date his federal action was dismissed

to file his state court action against Squadron Ellenoff, thereby allowing claims allegedly accruing in 1992 to be asserted in 2004. (Pet. at 6-7). That would make a mockery of limitations periods, and utterly deprive defendants of the repose to which they are entitled.

At bottom, therefore, no basis exists for Gold's attempt to elevate his disagreement with the New York courts' interpretation of its service requirements into an issue of constitutional dimension. Gold failed to raise any purported constitutional issue either in the trial court or in the Appellate Division, where it was required to be raised to be preserved at all. *See* Robert L. Stern et al., *Supreme Court Practice* § 3.16, at 168-69 (8th ed. 2002) (citing cases) ("It is essential to the jurisdiction of the Supreme Court under [28 U.S.C.] § 1257(a) that a substantial federal question has been properly raised in the state court proceedings."); *id.* § 3.18, at 177 ("Generally, the litigant must follow the state procedures in raising the federal question."); *Melahn v. Hearn*, 459 N.E.2d 156, 157 (N.Y. 1983) ("Since th[e] constitutional issue was not raised below, it is not preserved for our review"). Equally important, the U.S. Constitution is in no way implicated by a state court's enforcement of its own procedures for when a summons must be served.

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

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